



Worker's job reinstated after unfair dismissal

Author: [Charlotte Clark](#)

Email: charlottec@hallpayne.com.au

Phone: 02 8280 4100

Date: Monday January 24, 2022

A recent decision of the Full Bench of the Fair Work Commission has quashed a compensation order in an unfair dismissal matter and held reinstatement to be the appropriate remedy. Ultimately, the Full Bench found that the employer failed to demonstrate a loss of trust and confidence in the employment relationship.

Background to the unfair dismissal claim

In the case of *Wally Moszko v Simplot Australia Pty Ltd* ('**Moszko**'), Mr Moszko worked for Simplot as a potato processing plant shift feeder. In November 2020, Simplot terminated his employment on account of allegations he had failed to perform bunker drains across two workdays and falsified a log sheet.

Following the termination, Mr Moszko lodged an [unfair dismissal application](#) seeking reinstatement to his position with Simplot.

Unfair dismissal application successful

At first instance, Commissioner Harper-Greenwell found that Mr Moszko was part of a team with shared responsibility for the relevant duties, and the failure to perform duties could not conclusively be attributed to him. The Commissioner consequently held that none of the allegations could be substantiated and that Mr Moszko's dismissal was harsh, unjust and unreasonable.

The Fair Work Commission ordered that Mr Moszko be compensated rather than reinstated

Although Mr Moszko sought reinstatement to his position with Simplot, the Commissioner held that reinstatement was inappropriate because Simplot's trust and confidence in Mr Moszko had been damaged by:

1. the fact that the bunker drain issues remained 'unresolved' and Simplot was still unsure who was responsible; and
2. additional, unrelated allegations of workplace misconduct against Mr Moszko that had arisen during the proceedings.

The Commissioner considered that if Mr Moszko was reinstated, his work was likely to be closely scrutinised by Simplot and subject to further investigation. As such, the Commissioner held that there were low prospects of a healthy working relationship being re-established between Mr Moszko and Simplot.

In place of reinstatement, the Commissioner ordered Simplot to pay compensation of \$9,200 plus superannuation to Mr Moszko.

The Fair Work Commission's decision was appealed by Mr Moszko.

The Full Bench of the Fair Work Commission quashed the original decision and ordered reinstatement

On 10 November 2021, a [Full Bench of the Fair Work Commission quashed Commissioner Harper-Greenwell's decision](#) and ordered that Mr Moszko be reinstated to his position at Simplot with back-pay and continuity of service.

In reaching their decision, the Full Bench endorsed [Nguyen v Vietnamese Community in Australia \(Nguyen\)](#), which stated that reinstatement is inappropriate where:

1. further termination is 'almost certain', making reinstatement 'futile'; and/or
2. there has been a loss of trust and confidence such that it would not be feasible to re-establish the employment relationship.

Nguyen also considered the concept of 'loss of trust and confidence', and stated that:

1. most employment relationships are 'capable of withstanding some friction and doubts'; and
2. allegations of loss of trust and confidence must be 'soundly and rationally based' and the onus of proof is on the party asserting this claim.

In Moszko, the Full Bench held that reinstatement was the appropriate remedy as a sufficient level of trust and confidence could be restored to make the employment relationship viable and productive.

In reaching this conclusion, the Full Bench considered the unresolved bunker drain issues and noted that:

- although the bunker drain issues remained unresolved (and unsubstantiated), any suspicion Simplot had that Mr Moszko was responsible was not a sound or rational basis to lose trust and confidence in Mr Moszko;
- none of Simplot's witnesses had indicated that there was a loss of trust and confidence in Mr Moszko; and

- there was no witness testimony to support a finding that Mr Moszko's work practices would be more closely scrutinised and that Simplot no longer trusted him to work unsupervised.

In considering the additional, unrelated allegations of workplace misconduct against Mr Moszko which arose during the proceedings, the Full Bench noted:

- the further allegations had not been investigated by Simplot and Simplot had not expressed a view on those allegations, even on a preliminary basis;
- as the further allegations had not been investigated it could not be said that reinstatement would likely lead to disciplinary action or termination;
- there was no evidence that these allegations had affected Simplot's trust and confidence in Mr Moszko; and
- the employment relationship was capable of withstanding some friction and doubts, including those raised by the new allegations.

In determining that reinstatement was appropriate in all of the circumstances, the Full Bench also considered the following factors:

- The importance of Mr Moszko's role, which meant that Simplot 'needs to be able to rely on Mr Moszko to provide accurate and reliable information and to perform the duties required of him';
- There was no valid reason for dismissal, which supports a finding that reinstatement is appropriate (but is not determinative);
- Mr Moszko was a longstanding employee of 23 years and had been unable to secure permanent work since his dismissal;
- Mr Moszko expressed a desire to be reinstated and held no ill will towards Simplot or its employees;
- Mr Moszko's claims during proceedings that Simplot had mishandled the allegations – which included calling the disciplinary process a 'witch hunt'– did not necessarily reflect a loss of trust and confidence in Simplot. This is especially so, given Mr Moszko's representations to the contrary and given that Simplot *had* mishandled the allegations;
- Past, unrelated instances of misconduct on the part of Mr Moszko did not indicate loss of trust and confidence. These incidents did not result in dismissal at the time, indicating that there was enough trust and confidence remaining for the relationship to continue; and
- Simplot, bearing the onus of proof, did not adduce sufficient evidence to support its contention that it had lost trust and confidence in Mr Moszko.

Lesson for those seeking reinstatement after a successful unfair dismissal claim

The question of whether reinstatement is an appropriate remedy will depend on whether a sufficient level of trust and confidence can be restored to make the relationship between employee and employer viable and productive. This can be a complicated question and it is consequently, important to seek legal advice about any potential claim.

If you've been dismissed and think it's unfair, unjust or unreasonable, there are a strict time limits for lodging a claim. Contact one of our employment lawyers to ensure your rights and entitlements are protected.

Contacting a Hall Payne employment lawyer

You can contact us by phone or email to arrange your consultation; either face-to-face at one of our offices, by telephone or by videoconference consultation.

Phone: [1800 659 114](tel:1800659114)

Email: general@hallpayne.com.au

This article relates to Australian law; either at a State or Federal level. The information contained on this site is for general guidance only. No person should act or refrain from acting on the basis of such information. Appropriate professional advice should be sought based upon your particular circumstances. For further information, please do not hesitate to contact Hall Payne Lawyers.